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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/749,761	12/31/2003	Paul T. Van Gompel	20,240	9121

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KIMBERLY-CLARK WORLDWIDE, INC.  
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EXAMINER

CHAPMAN, GINGER T

ART UNIT PAPER NUMBER

3761

DATE MAILED: 02/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/749,761

Applicant(s)

VAN GOMPEL ET AL.

Examiner

Ginger T Chapman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-46 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-46 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>11/16/2004</u> . | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 5, 7, 9-13, 15, 16, 21, 24, 26-28, 30-32, 35, 37,39, 41-43, 45 and 46 are rejected under 35 U.S.C. 102(b) as being anticipated by Allen (5,037,416).

As depicted in figures 1 and 5, Allen discloses a disposable garment which includes: a liquid impermeable outer layer (16) which may be pleated (col. 4, line 48); an absorbent core (18) joined to the outer layer; and a liquid permeable elastic inner layer (12) having two or more layers of material (col. 6, lines 27-28; see also col. 11, line 58) and further having a perimeter (22, 24, 50) (column 2, lines 66-68) and a front piece (42) and a back piece (44) which are elastic in the lateral direction (col. 7, lines 7-11, see also col. 6, lines 65-66, ) and a crotch piece (46) which is elastic in the longitudinal direction (50) (col. 4, lines 19-24) wherein the crotch piece defines an opening (21) located in an internal position to the elastic inner layer perimeter (col. 12, lines 26-32), and the inner layer perimeter is bonded to the outer layer perimeter (col. 3, lines 36-38). The elastic inner layer may have zones of differing elastic properties (col. 13, line 41). The outer layer length is greater than the inner layer length in the longitudinal direction (col. 13, lines 14-15) and the inner and outer layers may be at least partially joined at their perimeters using ultrasonic, heat/pressure or adhesive in a variety of bonding patterns (col. 4, lines 51-52).

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Claims 4, 17, 18, 19, 20, 33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allen et al as applied to claim 1 above, and further in view of U.S. Patent No. 4,756,709 issued to Stevens.

Allen discloses a disposable garment having an elastically extensible inner layer but fails to teach a stretchable outer layer. As best depicted in figures 14 and 19, Stevens teaches a disposable garment wherein the outer cover (20) is resiliently stretchable in the longitudinal and lateral directions (71, 73) and laterally extensible (80, 82) thereby enhancing the ability of the garment to conform to the anatomy of the wearer while the wearer engages in various activities and assumes various positions. It would therefore be obvious to one of ordinary skill in the art at the time of invention to construct the garment of Allen with a stretchable extensible outer layer as taught by Stevens to produce a diaper providing an improved fit to the wearer.

Claims 6, 8, 22, 23, 36 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allen as applied to claim 1 above, and further in view of U.S. Patent No. 5,817,086 issued to Kling.

Allen discloses the use of inner and outer layers having two or more layers or laminae of materials. Allen fails to address the use of impermeable inner layers or permeable outer layers in an absorbent garment such as a diaper. However, it is well known in the disposable absorbent garment art that "layer" when used in the singular can have the dual meaning of a single element or a plurality of elements.

Kling discloses the use of layers having a plurality of elements. In particular, Kling teaches an absorbent garment having an outer layer (5), an inner layer (2) with a large opening (17) and an absorbent assembly (4) positioned there between. The outer layer (5) consists of a

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laminate of materials such as, for example, polyethylene or polypropylene with a liquid permeable fiber fabric. The bottom layer can also consist of a laminate of thermoplastic layer and a fiber fabric, or a fiber fabric extrusion coated with a plastic film wherein the liquid permeable fiber fabric is placed outermost so that the diaper is given a textile look (col. 3, lines 60-68) providing a pleasing cloth-like appearance and feel to the user. Further, Kling teaches a liquid impermeable inner layer (2) having a large aperture or opening (17) for receiving urine and thus permitting the passage of liquid through the openings of the liquid impermeable inner layer (col. 8, lines 44-51) to the absorbent assembly while maintaining a dry feel to the surface of the layer in contact with the skin of the wearer and thus reducing skin irritation or "diaper rash".

Therefore, it would be obvious to one of ordinary skill in the art at the time of invention to construct the apertured inner layer of Allen with a liquid impermeable material as taught by Kling to provide a dry skin-contacting surface to the wearer. It would further be obvious to one of ordinary skill in the art at the time of invention to utilize the outer layer of Allen with the permeable fiber fabric lamina placed outermost as taught by Kling to provide a pleasing cloth-like appearance for the user of the garment.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

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F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-46 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-51 of copending Application No. 10/750402. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims are directed to substantially identical dual layer garments and are coextensive in scope.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

#### ***Response to Arguments***

Applicant's arguments filed January 6, 2005 have been fully considered but they are not persuasive.

Applicant submits that (1) Allen fails to teach a front piece and a back piece that are elastic in a lateral direction and a crotch piece that is elastic in a longitudinal direction, (2) that Allen does not teach the elements arranged as required by the claims. Applicant further submits

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that Examiner relies on the elastic members (19) for the elastic inner layer. As noted above, (1) Allen expressly describes the topsheet as elastically extensible in at least one direction (col. 6, lines 65-66) and further teaches that the topsheet may be elastically extensible in more than one direction and in a direction orthogonal to the longitudinal axis; a direction orthogonal to the longitudinal axis is defined as a direction at right angles and thus is the lateral direction. (2) The elements of the diaper of Allen are arranged in the substantially identical configuration of the claimed diaper.

Examiner does not rely on the elastic members (19) for the elastic inner layer; the elastic members render the crotch piece extensible in a lateral direction. The topsheet is the elastic inner layer (see cols. 9 and 10).

### *Conclusion*

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ginger T Chapman whose telephone number is (571) 272-4934. The examiner can normally be reached on Monday through Friday 8:30 a.m. to 5:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on (571) 272-4390. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Ginger Chapman  
Examiner, Art Unit 3761

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Larry I. Schwartz  
Supervisory Patent Examiner  
Group 3700